BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal)
)
of)
)
GEORGICA GUETTLER)

Appearances:

For Appellant: Arthur Anderson & Co., Accountants and Auditors

For Respondent: Burl D. Lack, Chief Counsel; Crawford H. Thomas, Associate Tax Counsel

O P I N I O N

This appeal is made pursuant to Section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Georgica Guettler to proposed assessments of additional personal income tax in the amounts of $122.74, $94.17 and $564.79 for the years 1946, 1947 and 1948, respectively.

Appellant filed returns for the years in question and reported as income patent royalties received from Canadian licensees. Under Section 27 of the Canadian Income War Tax Act a 15% tax in the amounts of $1,445.41, $2,354.16 and $9,413.02 was withheld from such royalties for the years 1946, 1947 and 1948, respectively. For the year 1946 the Appellant claimed the Canadian tax as a credit against her California personal income tax, which was disallowed. For the years 1947 and 1948 the Appellant did not claim the Canadian tax as a credit against her California tax but deducted the amount thereof from her gross income, these deductions also being disallowed.

Although Appellant originally urged that the Canadian tax was allowable under Section 17976 of the Revenue and Taxation Code as a credit against her California tax she now concedes that the Canadian tax is not a net income tax and, accordingly, is not allowable as a credit. The

sole question left for our determination is whether the Canadian tax is allowable as a deduction from gross income under Section 17305 of the Code.

During all of the years in question Section 27(1) of the Canadian Income War Tax Act read as follows:

> "In addition to any other tax imposed by this Act, an income tax of fifteen per centum on nonresident persons is imposed, without any exemption or deduction, in respect of the gross amount of all rents, royalties or similar payments for the use in Canada of real or personal property, patents, or for anything used or sold in Canada."

The pertinent parts of Section 17305 of the Revenue and Taxation Code provide:

> "In computing net income there shall be allowed as a deduction taxes or licenses paid or accrued during the taxable year, except:
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> * * *
>
> (b) Taxes on or according to or measured by income or profits paid or accrued within the taxable year imposed by the authority of
> (1) The Government of the United States or any foreign country."

It is at once apparent that under Section 17305 Appellant is not entitled to deduct the amount of the Canadian tax from her gross income if that tax is laid on or measured by income *or* profits. The characterization of the exaction as an income tax by the Canadian statute does not, however, preclude the deduction. The meaning of the words "income or profits" as used in Section 17305 is to be determined by the criteria prescribed by our revenue laws. Biddle v. Commissioner of Internal Revenue, 302 U. S. 573; Keasbey & Mattison Co. v. Rothensies, 133 F. 2d 894. As limited by these criteria the term "income" includes only gain or profit and excludes receipts which constitute the return of capital. Doyle v. Mitchell Bros. Co., 247 U. S. 179; Eisner v. Macomber, 252 U. S. 189.

Section 27(1) of the Canadian Income War Tax Act imposed a special tax on non-residents which was in addition to any other tax imposed by the Act. The measure of the tax was the gross amount of rents, royalties and similar payments for

anything used or sold in Canada. Where such payments were consideration for the sale of property, part of the receipts represented a return of capital. (Burnet v. Logan, 283 U. S. 404, 51 S. Ct. 550.) The Supreme Court of Canada has construed similar language of a provision applicable to residents of Canada as imposing a tax on the return of capital. (Minister of National Revenue v. Wain-Town Gas and Oil Co., Ltd. (1952) C.T.C. 147.) We conclude therefore, that under Section 27(l) the tax was not limited to income or profits, but was imposed on non-resident persons in respect of specific items of gross receipts,

ORDER

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 18595 of the Revenue and Taxation Code, (1) that the action of the Franchise Tax Board on the protest of Georgica Guettler to a proposed assessment of additional personal, income tax in the amount of $122.74 for the year 1946 be, and the same is hereby, modified as follows: in computing the net income of said Georgica Guettler for the year 1946 the Franchise Tax Board is hereby directed to allow as a deduction, pursuant to Section 17305 of the Revenue and Taxation Code, the tax paid by Georgica Guettler to the Dominion of Canada for the year 1946 in the amount of $1,445.41 and (2) that the action of the Franchise Tax Board on the protests of Georgica Guettler to proposed assessments of additional personal income tax in the amount of $94.17 and $564.79 for the years 1947 and 1948, respectively, be and the same is hereby reversed.

Done at Sacramento, California, this 1st day of April, 1953, by the State Board of Equalization.

Wm. G. Bonelli, Chairman

Paul R. Leake, Member

J. H. Quinn, Member

Geo. R. Reilly, Member

_____, Member

ATTEST: Dixwell L. Pierce, Secretary